IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.1104 OF 2000.

Smt.Pramila Lalbhai Dabhoya
and Anr. : Appellants.

versus

Dr.Harish Lalbhai Dabhoya : Respondent.

Mr.M.K.Nesari for the appellants.
Mr.H.S.S.Murthy for the respondent.

CORAM : D.G.DESHPANDE,J.

DATED : 24th March 2005.

JUDGMENT

1. Heard advocate Mr.Nesari for the appellants and advocate Mr.Murthy for the respondent. Appellants are the original defendants and, Respondent is the original plaintiff. I will refer to the parties as the plaintiff and defendants. The case of the

plaintiff is as under :-

2. Plaintiff is the son of defendant No.1 - Pramila and brother of Defendant No.2 - Shekhar. Defendant No.1 Pramila was the employee of Bombay Municipal Corporation; she was allotted a plot No. 45 in a plot of owners co-operative society formed by municipal employees. She constructed a bungalow consisting of ground floor on the said plot. According to the plaintiff till 1982 he was employed as resident doctor in Wadia Hospital, Bombay. He gave up his employment in 1982 and started residing in the suit premises i.e. in his mother’s bungalow. He got married thereafter and he started his hospital at Borivli. This is the background for the further case of the plaintiff.

3. Some time in 1985 it was mutually agreed and decided amongst the plaintiff, the defendants and on more brother Dr.Kishore Dabhoya that since there was available FSI, two more flats could be constructed on the suit bungalow by raising two floors so that each of the son could have one floor each and, it was mutually agreed between the parties to do so. It was further agreed that

first floor would be occupied by defendant Nos. 1 and 2 and second floor would be occupied by Dr.Kishore who was not a party to the proceedings. The plaintiff further states in the plaint, "With the agreement and understanding for construction of first floor, and the extension ground floor by about 450 sq.ft. which is presently used by plaintiff as his bed room and study room."

4. Accordingly, the plaintiff spent for the construction of first floor and the extension of ground floor. Defendant No.2 also contributed towards expenses of first floor with the mother Pramila. Dr.Kishore did not contribute and, as a result second floor could not be constructed. Then first floor was completed in 1986 and, defendant Nos. 1 and 2 shifted to the first floor and, the plaintiff continued on the ground floor exclusively. Further, according to the plaintiff, since 1986 the plaintiff is contributing a sum of Rs.200/- per month being the 50% of the society outgoings inclusive of taxes etc. He also spent for painting and surfacing the inner passage etc. But thereafter the mother - defendant No.1 Pramila tried to

interfere with the domestic affairs. She started picking up quarrels and creating scenes and, in that background, the plaintiff has filed the suit for restraining the defendants from entering into or remaining upon the ground floor premises and/or from obstructing exclusive use and occupation of the plaintiff of the ground floor premises.

5. This is, therefore, a case where the mother is the owner of the property, that is of the plot as well as ground floor, but the plaintiff on the basis of so called agreement wants to restrain his mother permanently from exercising any right of ownership over the property on the basis of permanent injunction of the nature,

> "to prohibit the defendants from entering into or remaining upon the ground floor premises exclusively used and occupied by plaintiff and his wife and son and persons permitted by the plaintiff and, further to restrain the defendants from obstructing or interfering use, occupation ingress and egress of

plaintiff etc. into and out of the ground floor premises of building Adwait."

6. Therefore, this is a case where without making any declaration of ownership regarding ground floor, the son wants that his mother be injuncted in the aforesaid manner. The natural consequence is, if such an injunction is granted, the mother would not be able to sell the ground floor, gift it, or make a Will of it, or deal with in any manner because if she does so, the injunction, so granted against her, will come in the way of subsequent transferee in getting possession of ground floor from the plaintiff. In other words, this is a case where the plaintiff under the garb of injunction wants to exert and exercise the ownership right over the ground floor, though he may not be able to sell the property. But once a permanent injunction asked for is given, the true owner, the real owner and his own mother will be completely, totally and for ever deprived of exercising the ownership right over the property in any manner whatsoever. Further if such an injunction is

granted, she will not be able to oust the plaintiff even by having recourse to, "due course of law" because in any suit she files subsequently, the impugned judgment or findings given by the trial Court, by which the plaintiff’s rights are recognised in respect of ground floor, will come in her way as resjudicata. Therefore, this is a suit filed by the plaintiff on the basis of oral agreement to deprive his mother of all the ownership rights in respect of the property. The suit has been decreed by the trial Court and the consequences will automatically follow viz. the appellant/mother will not be able to deal with or dispose of her property i.e. ground floor in perpetuity i.e. for ever.

7. Therefore, the question involved in this case is, whether the plaintiff can be given such a relief as prayed for. Secondly, when simplicitor injunction without declaration of title in such a background should have been given by the trial Court. Thirdly, when all reliefs under the Specific Reliefs Act being equitable reliefs, whether the Court should have, even if it is accepted for the sake of arguments that the

plaintiff succeeded in proving oral agreement, granted such an injunction as prayed for by the plaintiff. It is in this background that the whole case has to be considered.

8. Mr.Nesari, appearing for the appellants/defendants, strenuously contended that since the entire case of the plaintiff is based on the oral agreement, the court will have to see and scan whatever pleadings of the plaintiff regarding that agreement; what is the evidence adduced by the plaintiff in proof of the said agreement and, if the evidence and pleadings are not sufficient to come to conclusion in favour of the plaintiff, then according to Mr.Nesari, the trial Court should have dismissed the suit. Secondly, Mr.Nesari contended that the attempt of the plaintiff is to corroborate his theory and oral agreement by certain subsequent payments made by him for the construction of first floor. In this regard Mr.Nesari contended that, that piece of evidence, may at the most prove, if accepted as true that the plaintiff has made some contribution for the construction of first floor,

but the crucial question posed is, whether those payments or contribution in construction can deprive the mother of her ownership right and, whether the permanent injunction should have been granted by the Court.

9. As against this, Mr.Murthy, appearing for the respondent/plaintiff, contended that the story of the plaintiff regarding oral agreement has been given by the plaintiff in the plaint and, though there is no independent corroboration to such an agreement, the circumstances brought on record are strong enough to uphold the contention of the plaintiff that such an agreement was entered into and, in pursuance thereof the plaintiff has spent huge amount and, therefore, has acquired right of exclusive possession on the ground floor. He further contended that since the agreement is in between the members of the family, there was no question of keeping independent witness present at the time of agreement. But, according to him, the circumstances that have been brought on record subsequent to the agreement do clearly prove existence of agreement. He contended that

whether the injunction results in depriving the owner of his ownership right is not a question before the Court, but, according to him, if the plaintiff succeeded in proving his case of agreement, then the plaintiff must get relief whatever will be the consequences. In view of this submission and since the case of the plaintiff is about the oral agreement, one must look at the plaint.

10. The averments regarding oral agreement are to be found in para 3 of the plaint. The plaintiff has stated as under :-

> "Sometime in 1985 it was mutually agreed and decided among the plaintiff, the defendants and the brother of the plaintiff Dr.Kishore Dabhoya, that since there were available F.S.I. two more flats can be constructed by raising two floors. So that each of the sons can have one floor each for their exclusive, use, accordingly it was orally agreed between the parties as mentioned above that two floors will be raised on the then existing building. The first floor

will be occupied by Defendant No.1 and 2 and the 2nd floor will be used by Dr.Kishore. With the agreement and understanding for construction of first floor, and the extension ground floor by about 450 sq.ft. which is presently used by plaintiff as his bed room and study room. The plaintiffs father also contributed by selling his flat at Vazranaka. In consideration of the said monetary contribution for the first floor the ground floor was given to the plaintiff. Defendant No.2 also contributed so that he can have exclusive use of the first floor with the mother."

11. As against these pleadings, the plaintiff, in his evidence, has stated as under:-

"Sometime in later part of 1982 I expresses my desire to my mother that after dissolution of my first marriage, I shall be re-marrying and there would be a need for larger premises. At this my mother suggested that as there is a balance F.S.I. in the building we can

put up further construction and also she proposed to me that the balance F.S.I. is such that two more storeys can be constructed after extension of ground floor and she also proposed that in case of the sons contribute his own share in the construction, additions, alterations, improvement then independent flats can be constructed and each son will have for his permanent and exclusive use single and independent flat. At the same time she also proposed that after the construction the building of ground floor plus two upper floors whatever monthly outgoing will come each one has to share equally. In these circumstances we decided to go ahead with the construction. This was discussed in presence of all family members i.e. myself, my mother, my two brothers and my father. All present at that time accept the propose as above including myself."

12. When the entire case of the plaintiff is based on the oral agreement, then it will be clear, from the reproduction of the plaint with

reference to the agreement and, the evidence on oath, that the case put up in the evidence by the plaintiff and, the case pleaded in the plaint are totally different. The first lacuna or defect in the case is, in the plaint no date when the talks between the parties commenced and no date when the talks concluded is given. In the plaint nothing is mentioned as to who initiated the talks and who was in need of a separate accommodation and, how and from whom the proposal originated. In plaint it is not mentioned that the plaintiff was going to re-marry; that he was in need of larger premises and, therefore, he opened the talks with the mother. And most important thing is, in the evidence, that is the portion of the examination-in-chief reproduced by me above, there is no mention that either the mother or the brother ever agreed that ground floor was to be exclusively used and occupied by the plaintiff and, the first floor was to be exclusively used and occupied by both the defendants i.e. the mother and the other brother - defendant No.2.

13. It will be clear, therefore, that the pleadings regarding oral agreement are

insufficient. They are lack in material particulars and, secondly the evidence of the plaintiff is not consistent.

14. The other important thing, that appears after perusal of the plaint, is that no-where in the plaint the plaintiff has given, when the oral agreement was concluded, when he started the work of extension of ground floor and the construction of first floor and, how much was the expenses required for him to spend for extension of ground floor and construction of first floor and, how much amount he actually spent and how much amount his brother - defendant No.2 spent. What is stated by the plaintiff is, "Defendant No.2 also contributed so that he can have exclusive use of the first floor with the mother"; and then the plaintiff alleged, "After the first floor was completed in 1986 the defendant No.1 and 2 shifted to first floor etc....." The plaint is running into 16 paras. No-where he gives all these material particulars about quantum of amount spent by him, meeting about his investment. And if para 3 of the plaint is read minutely, the plaintiff no-where states that he has spent exclusively for extension of the ground

floor and substantially for the construction of first floor. Not a word in this regard is pleaded by the plaintiff. What the plaintiff has stated is, after he was given exclusive possession of the ground floor, the plaintiff has furnished the ground floor by spending huge amount. He also spent for painting and surfacing the inner passage etc. He crave leave to, refer to and rely upon the bills, receipts, etc in this regard.

15. In a civil suit, and particularly the suit of this nature based on oral agreement, the plaintiff should have averred and specifically pleaded as to the date on which oral agreement was concluded; the date of commencement of construction; amount spent by the plaintiff for extension of ground floor and construction of first floor; the amount spent by his brother - defendant No.2 and also by his mother. However, the plaint is totally lacking on all these material aspects and, therefore, in fact, there is no basis for the plaintiff to lead evidence on all those important aspects. The pleadings about his spending are with reference to the painting and surfacing the inner passage after he got

exclusive possession of the ground floor. Now admittedly, the exclusive possession of the ground floor could not have been given to the plaintiff unless he has spent for extension of ground floor and construction of first floor. But no-where in the plaint the plaintiff has stated as to how much amount he has spent in that regard.

16. This is not a case where the defendants/appellants have given any admission in their written statement about the so called oral agreement or about the theory of the plaintiff regarding spending of amount for extension of ground floor and construction of first floor. This is firstly a case where the defendants have denied any such agreement or arrangement between the parties and, secondly, this is a case where the defendants had no occasion to meet the case of the plaintiff about his spending for the extension of ground floor and construction of first floor, because such a case was not at all pleaded by the plaintiff. All these lacunas in pleadings or defects in pleadings become more vital in this particular case because of the nature of the relief which the plaintiff is

seeking without seeking declaration that of title. If by virtue of the agreement, the plaintiff was to become a factual owner, though not owner on record, then it was necessary for the plaintiff to seek declaration. It is true that in every suit for permanent injunction, there need to be a relief of declaration. But when it is found that a party carefully and cleverly avoids to ask for a declaration, then the case has to be viewed more seriously.

17. Mr.Murthy for the plaintiff contended that because the agreement was between the family members, there was no outsider to witness the agreement. This may be true. But the question is of preponderance of probabilities. Whether mother who gets a plot and constructed a house of her own, would have easily agreed for such a proposal of the plaintiff who was to take bite of her ownership right without her getting anything from the plaintiff. Mr.Murthy contended, with reference to the definition of word consideration in the Contract Act, that construction of first floor by the plaintiff was a consideration for the mother. That could be a consideration in a given case. But in the pleadings of the

plaintiff, already referred to above, there is nothing nor any averment of the plaintiff is there that he spent such and such amount or particular amount for construction of first floor or for extension of ground floor.

18. Mr.Murty and Mr.Nesari took me through the entire documentary evidence relied upon and proved by the parties. It is true that there are certain documents in possession of the plaintiff to show that he has spent for the construction. It is equally true that there are some documents in possession of the defendants where she proved that she had spent for the construction. But the question still remains is, whether the contribution for construction by the plaintiff either for construction of first floor or for extension of ground floor is a proof of existence of agreement abrogating and curtailing down the ownership right of the mother - defendant No.1. If the agreement is not proved, then mere spending by the plaintiff can, at the most, give him a right to occupy the premises till he is evicted by his mother by following due process of law and, therefore, without going through the number of documents filed on record by the

plaintiff, this appeal can be decided on the circumstances brought on record and referred to above by me.

19. Even though, I have held that it is not necessary to go to the number of documents relied upon by the parties, the documents have been filed by both the plaintiff and the defendants in their respective compilations. So far as the documents of plaintiff are concerned, they include mostly the receipts issued by Hema Paint Store for purchasing different materials. The receipts issued for the painting work done by one Ravji Gopal Bedke. They also include some cash receipts or cash memos. The compilation also contain three loose papers which were tendered by the plaintiff to prove the amount spent by him. They are at Exhibit H Colly. Mr.Nesari contended that they are not books of account regularly kept in the course of business and, therefore, those loose papers cannot be taken into consideration as an evidence regarding amount spent by the plaintiff.

. As against this, Mr.Murthy for the plaintiff contended that even though Exhibit H

Colly are the loose papers, there are certain entries which could be actually tallied with the spending made by the plaintiff.

. I find considerable force in the objection raised by Mr.Nesari. If a party wants to prove certain documents as an account maintained by him, then all those aspects which give credibility to the account must be proved and credibility is attached to account books, because they are maintained in the course of business, they are maintained daily or regularly or regular intervals, they contain both columns of income and expenditure and they are followed by or supported by cash book entries. Obviously Exhibit H Colly is not the extract of books of accounts. They are not supported by entries of income or they do not pertain to the expenses made by the plaintiff during that period. They pertain only to the so called expenses made by him for the construction. They are admittedly on the loose papers and even if some of the entries are supported by other documents, the over all effect of Exhibit H is not as acceptance of regular books of account on record.

20. However, I have already held that so far as oral agreement between the parties as pleaded by the plaintiff is concerned, the pleadings in the plaint and the oral evidence are different and, therefore, mere spending by the plaintiff for construction, whatever amount he might have spent, does not support the theory of oral agreement and the oral agreement, as pleaded by the plaintiff, is of a nature that takes away, practically, the ownership right of the defendant No.1 over the property and, since the injunction is an equitable relief, the Court will have to think twice before granting injunction prayed for.

21. The trial Court while deciding this aspect of the matter did not take into consideration this background. The court did not minutely scan the pleadings of the plaintiff and variance between the pleadings and proof of the oral agreement. The trial Court came to the conclusion, in para 30 of its judgment, that the plaintiff contributed substantially to the costs of construction. The trial Court also took into consideration the conduct between the parties

about outgoings subsequent to the construction. The trial Court lost sight of the important fact that in the plaint the plaintiff has never and no-where asserted as to how much amount he was required to spend for the extension of ground floor and the construction of first floor and, how much the contribution of defendant No.2 and, therefore, this is a case where the plaintiff is permitted to adduce evidence without there being any pleadings. The pleadings were absolutely necessary because the case of the plaintiff is based on oral agreement and, therefore, in these circumstances, there is no alternative but to hold that the plaintiff has failed to prove his exclusive possession arising out of and flowing from oral agreement. Secondly, the injunction asked for by the plaintiff cuts deeply the ownership right of defendant No.1 - mother and, grant of injunction is bound to convert her ownership of ground floor without there being any right to dispose of or part with the same as a tribute of her ownership right over the property.

22. For all these reasons, the judgment of the trial Court cannot be up held in the form in which injunction is granted. However, because

the plaintiff has spent some amount he will have to be granted some protection viz. defendant No.1 will not be evicted him without following due process of law. In other words, even if the plaintiff has failed to prove the agreement, his possession can only be disturbed by the defendants by following due process of law and not by other means. In these circumstances I pass the following order :-

:ORDER:

Appeal is partly allowed.

The decree and order passed by the trial Court is set aside.

Permanent Injunction granted against the appellants is modified. The appellants will not be entitled to evict the plaintiff without following due process of law. Till then plaintiff's possession of the ground floor premises will be protected.

No order as to costs.

[D.G.DESHPANDE]

24/03/2005 JUDGE.